

FIRST DIVISIONAL COURT.

JANUARY 31ST, 1921.

JOHNSTON v. JOHNSTON.

Deed—Conveyance of Land by Mother to Son—Consideration—Covenant of Son to Maintain Mother on Land—Part Performance—Action by Administrator of Mother's Estate for Damages for Breach of Covenant—Acceptance of other Benefits in Lieu of Benefits Contracted for—Conduct of Mother—Inference—Claim by Virtue of Possession—Limitations Act.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 18 O.W.N. 11.

The appeal was heard by MEREDITH, C.J.O., MAGEE, HODGINS, and FERGUSON, J.J.A.

W. R. Meredith, for the appellant.

J. M. Donahue, for the defendant, respondent.

FERGUSON, J.A., in a written judgment, said that the plaintiff upon the appeal confined his claim to damages for breach of the defendant's covenant contained in the deed of the 27th July, 1900, whereby Charlotte Johnston, the mother of the defendant, conveyed a house and land to him, and he covenanted with her that "he will from the date hereof and for and throughout the rest of her natural life provide her with a comfortable home on said lands and premises and suitable maintenance, including food, fuel, clothing, medicine, medical attendance, and nursing."

The appellant contended that the trial Judge based his judgment on the erroneous opinion that the cause of action alleged was one which did not affect the property of the deceased, but was in reality a cause of action arising from the personal conduct of the defendant and affecting only the personalty of the deceased, and therefore did not survive and pass to the plaintiff as administrator of the deceased's estate.

The trial Judge did express the opinion that the cause of action did not survive; but it was not necessary to deal with that question; for, on the evidence, the proper conclusion was, that the deceased accepted, in lieu of a room in the defendant's house and her maintenance there, the exclusive use and occupation of the whole house and premises, where she could and did have with her other members of her family, and where she and they resided and maintained themselves by keeping boarders. At the time the deed was made the defendant was living in the house and paying his mother for his board and lodging. He continued to do this down to his marriage, and after his marriage he and his